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| UNITED STATES OF AMERICA | ) |
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| | ) DEFENSE REPLY TO |
| | ) PROSECUTION'S RESPONSE |
| | ) RE MOTION TO |
| v. | ) DISMISS FOR LACK OF |
| | ) LEGISLATIVE AUTHORITY |
| | ) **D20** |
| SALIM AHMED HAMDAN | ) 22 October 2004 |

1. Timeliness. This motion is submitted within the time frame established by the Presiding Officer's order during the initial session of Military Commissions on 24 August 2004.

2. Relief Sought. Grant the original Defense Motion to Dismiss for Lack of Legislative Authority.

3. Facts. See Defense Motion, D20.

4. Law and Discussion.

A. Summary of Defense Argument

The prosecution bends American history and law in an attempt to justify this military commission. Unfortunately for them, their attempts paint a striking portrait of just how far this commission deviates from the law.

The Founders of our Constitution separated the government into three distinct branches for a reason: to avoid the abuse of power of the executive. Their complaints against the King revolved around the fact that King George had used the military to deprive colonists of civilian rights, including the rights to jury trial and habeas corpus. This military commission is a turn-of-the-clock back to an era before our Constitution and development of the Bill of Rights. To mask the trouncing of these charter documents, the Prosecution mixes apples with oranges at every turn, using cases about battlefield commissions when it suits them, cases about martial law when they can, and legal authorities about virtually anything else, however unrelated they may be to the matter at hand.

Here's the fundamental question that should be asked: When has a President *ever* set up a military commission in an area that is not a zone of war to try an offense that Congress has not explicitly said is triable by military commission and when Congress has not declared war? The answer is never, despite the prosecution's attempt to shroud that fact with historical irrelevancies. And there are good reasons why Presidents have never asserted the power that the prosecution asserts here: because it would be fundamentally incompatible with American Government.

B. The Prosecution Stretches the Supreme Court's *Hamdi* decision Far Past Its Meaning

The June 28, 2004, Supreme Court plurality opinion in *Hamdi* was a striking loss for the Prosecution:

> [W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances…[The Government's] approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.[1]

The Prosecution here and in other motions spends a lot of time trying to turn their loss in *Hamdi* into some sort of authorization for the commission here. In reality, the Court expressly declined to rule on the scope of the President's authority to act on his own, even in the far weaker case of *detention,* where Presidential power is at its apogee. There is absolutely no basis for thinking that *Hamdi* would mean that the President has powers when it comes to inventing a new architecture of justice. As the Supreme Court put it, "The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority, however, because we agree…that Congress has in fact authorized Hamdi's detention, through the AUMF." *Hamdi*, 124 S. Ct. at 2639. The plurality's analysis began by stating that "for purposes of this case, the enemy combatant that [the Government] is seeking to detain is an individual who, it alleges, was part of or supporting forces hostile to the United States or coalition partners in Afghanistan *and who engaged in an armed conflict against the United States there*. We therefore answer *only* the *narrow* question before us: whether the *detention* of citizens falling within *that* definition is authorized." *Id.* at 2639 (emphasis added); *see also id.*, at 2645 (similar). *Hamdi* does not therefore reach outside detention, particularly not to those unengaged in armed conflict. E.g., at 2462 ("carrying a rifle against Union troops").

There are at most two references to military tribunals in *Hamdi,* one is historical, the other supports Mr. Hamdan. The first is "The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by `universal agreement and practice,' are `important incident[s] of war.' *Ex parte Quirin,* 317 U.S. at 28." *Id.* at 2460. This description of past history is not in dispute. Indeed, it does not even answer the question of *what body*, (field commission, other commission, court-martial, civil court, or some other body) must

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[1] *Id*. at 2650 (emphasis added). *See also id*. at 2649-50 ("While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war…it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here."); *id*. at 2648, 2650-51.

try unlawful combatants. *See also id.* (referring to "mere detention"); *id.* at 2643 (stating that *Quirin* is "the most apposite precedent that we have on the question of whether citizens may be *detained* in such circumstances") (emphasis added).

The only other reference is *Hamdi*'s statement: "There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal." *Id.* at 2651. This victory for LCDR Swift establishes the authority of courts, including federal ones, to review military commission proceedings and highlights the need for this body to ensure that the Commission is appropriately authorized or properly constituted.[2] *Hamdi*'s plurality posed, but did not decide, these questions. Even its detention holding was anchored to proven combatants: "To be clear, our opinion *only* finds legislative authority to detain under the AUMF once it is sufficiently clear that the individual is, *in fact*, an enemy combatant." *Id.* at 2643. *See also id.* at 2642 ("legitimately determined to be Taliban combatants").[3]

Furthermore, the Prosecution's many Response briefs in D13-20 are notable for what they omit, such as the *Hamdi* plurality's gutting of the Prosecution's equal protection argument:

> Nor can we see *any reason* for drawing such a line here. A citizen, no less than an alien, can be 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States,' Brief for Respondents 3; such a citizen, if released, would pose *the same threat* of returning to the front during the ongoing conflict.

*Id.*, at 2460-61. Further, the plurality repeatedly looked to the GPW to outline the powers of the Government. *See id.* at 2641 (citing Art. 118 and article mentioning Arts. 85, 99, 119, 129); *id.* (stating that "our understanding is based on longstanding law-of-war principles"). Indeed, only one Justice argued that the Geneva Conventions did not apply. *Id.* at 2679 (Thomas, J., dissenting). The case for GPW application is even stronger here than in *Hamdi*, because international law is the source of authority for a commission.

At bottom, the only comfort the Prosecution might derive from their loss in *Hamdi* is the plurality's belief in "the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States." *Id.* at 2467. But that interest is <u>irrelevant</u> to this case. Mr. Hamdan is not challenging the President's detention power. If the Government is right that Hamdan is an enemy combatant, they may still detain him. As such, there are no national security implications whatsoever should this commission declare the military commission unlawful as applied to Mr. Hamdan. *See Ex Parte Milligan*, 71 U.S. 2 127 (1866) ("It is difficult to see how the *safety* of the country

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[2] The *Hamdi* plurality words mirrored precisely the arguments made by Commander Swift and his JAG colleagues as Amicus in *Rasul*, that a commission must be (1) legally constituted; (2) have personal jurisdiction over the accused; and (3) have subject-matter jurisdiction to hear the offense charged. *See* Brief of Military Attorneys in *Rasul*, available at www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/91/AmicusCuriae_Military_Attorneys.pdf

[3] As such, it cannot be said that *Hamdi*'s views on the AUMF with respect to prospective "detention" have anything to do with the question presented here about retrospective power to punish. Detention is of course a subset of "force," but meting out justice is a different concept altogether.

required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them.")(emphasis added). To the extent that there is some amorphous national security interest in prosecution, as opposed to detention, courts-martial are available. *See* 10 U.S.C. § 818 ("General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.").

The prosecution goes on to distort Justice Thomas' dissent in the hope of creating a fifth vote for their inventive logic. But they point to no statement that concerns anything but "detention." This is so because Justice Thomas carefully wrought his opinion to deal only with that question, mentioning detention at least forty-six times in his opinion. *See id.* at 2674, 2677-85. Indeed, Justice Thomas acknowledged that *punishment* stands on entirely different footing than detention, specifically isolating the *Milligan* case: "More importantly, the Court referred frequently and pervasively to the criminal nature of the proceedings instituted against Milligan…the punishment-nonpunishment distinction harmonizes all of the precedent." *Id.* at 2682 (citations omitted).[4] In the end, the Government confuses the detention power with its ability to punish. The former is well-established, and not in dispute.

C. Section 821 does not authorize a military commission to try Mr. Hamdan

The Prosecution never once points to any Act of Congress that affirmatively authorizes military commissions. 10 U.S.C. § 821 does not authorize the President to try Mr. Hamdan by commission. It merely negates the implication that the UCMJ deprives military courts of jurisdiction:

> The *provisions* of this chapter conferring jurisdiction upon courts-martial *do not deprive* military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

10 U.S.C. § 821. The statute, which lacks any affirmative grant of authority, is not even close to a clear statement by Congress to supplant civilian courts or courts-martial. *See Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) ("In traditionally sensitive areas, . . . the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.") (internal quotations and citation omitted).

The prosecution does not argue that Section 821 is such a clear statement – rather, they claim that the Court has considered its predecessor, Article 15 of the Articles of War, to act as authorization. But the Court's previous cases differ dramatically. First, they all involved an explicit declaration of war by Congress. In *Quirin*, for example, the Court's finding that

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[4] Indeed, Justice Thomas even altered a quotation from *Quirin* to cite it only for the proposition that "detention" is justified when *Quirin*'s original sentence affirmed both the detention and military commission. *Compare id.* at 2682 (Thomas, J., dissenting) *with Ex Parte Quirin* 317 U.S. 1, 25 (1942) at 25 (referring to "the detention and trial of petitioners").

Congress had authorized military commissions in the form of Article 15 was based on the fact that the President has the "power to wage war which Congress has declared." 317 U.S. at 26. The "war" was repeatedly mentioned. *Id.*, at 28, 29. Similarly, in *Yamashita*, the Court stated that the President's authority to try and punish enemy combatants is without qualification "so long as a state of war exists – from its declaration until peace is proclaimed." 327 U.S. at 11-12. *See also Madsen v. Kinsella*, 343 U.S. 341, 346 n.9 (1952)(commission derives its authorization from Congress's power to declare war). Thus, it is the declaration of war by Congress and its appurtenant grant of war powers to the President that functions as the clear statement.

Again, the Defense does *not* contend that a declaration of war is necessary to permit the President to use "force" against individuals or nations when America is attacked, including armaments as well as detention. For this reason, the Prosecution's citation to the broad powers of the President to fight enemies and his war powers are *irrelevant*. This case concerns a unilateral assertion of authority by the President to engage in a retrospective legal determination of guilt for crimes, something as to which an entirely different set of rules apply.

Moreover, *Yamashita* makes clear that the only function of Section 821 is to permit a commander, on the battlefield, to select a commission when a court martial is inconvenient to convene. *See* 327 U.S. at 66 n.31. The prosecution asks this commission, for the first time in American history, to permit trial by commission when war has not been declared, congress has not otherwise authorized the commissions, the commission is not in a zone of war, and the courts are open.[5]

Finally, the prosecution omits that a key source of authorization in the World War 2 cases has been repealed, for in those cases the Justices relied on 50 U.S.C. § 38. *Yamashita*; 327 U.S. at 7; *Quirin*, 317 U.S. at 27.[6] The absence of a modern section 38 is even more important because, at the time *Quirin* and *Yamashita* were decided, section 38 provided at least something of a statutory basis for charging non-servicemen via a commission because it appeared outside the sections of the Code dealing with the governance of military personnel (in distinction to section 821). With its repeal, there is now no indication that Congress in any way has authorized the use of commissions to try non-servicemen. Certainly the cryptic congressional statement in 2000 in enacting the Military Extraterritorial Jurisdiction Act (MEJA) does not suffice – it has not one word authorizing military commissions in it!

When there is no declaration of war, no Section 38, and no other authorizing legislation, there is no clear statement from Congress that the President may employ a process which necessarily involves the compromise of individual rights.

D. *Quirin* was decided on a different set of facts and is not controlling here

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[5] In the non-declared Civil War, Congress specifically authorized commissions in a series of very explicit Acts. *See* Winthrop, at 833.

[6] Section 38 was initially passed with the Espionage Act of 1917, 40 Stat. 219, which created criminal liability for espionage. It stated that "Nothing contained in this title shall be deemed to limit the jurisdiction of the general courts-martial, military commissions, or naval courts-martial . . . ." 40 Stat. 219, § 7. The entire Espionage Act was later repealed, Act of June 25, 1948, ch. 64, § 21, 62 Stat. 683, 862, and most of its provisions, but not § 38, were reenacted. *See, e.g.*, 18 U.S.C. §§ 793, 794. As such, of the two statutory provisions in the World War II cases, one no longer exists in current law.

The Prosecution today seeks to use a statute, the AUMF, with far more vagueness than the World War II declaration to authorize commissions. However broadly that statute might be read, it is impossible to find within it any such authorization. "Force" has, incident to it, detention, but not punishment. And it is entirely unreasonable to suppose that Congress knew it was authorizing such a power, one that had not been used in 60 years and even then used only in a far more restrained and far more appropriate set of circumstances. And particularly when the AUMF is only *prospective*, it is impossible to see how that creates the retrospective power to *punish*.[7]

Even if we were to ignore *Quirin*'s emphasis on presidential power to "wage war which Congress has *declared*" entirely, *Quirin*'s phrase "time of war" has been read narrowly. After all, in cases where the military's very jurisdiction over a defendant is contested, the military's courts have consistently favored a narrow reading that requires an actual declaration of war. *E.g., United States v. Averette*, 19 U.S.C.M.A. 363 (1970) (finding that the Vietnam conflict was not a time of war because, even though it qualified as such by general usage, that recognition "should not serve as a shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction"); *Cole v. Laird*, 468 F.2d 829, 831 n.2 (5th Cir. 1972) (civilians are subject to court-martial "if they serve in the field with the Armed Forces during a period of a formally-declared, global war"); *Robb v. United States*, 456 F.2d 768, 771 (Ct. Cl. 1972) ("the phrase 'in time of war' . . . refers to a state of war formally declared by Congress despite the fact that the conflict in Vietnam is a war in the popular sense of the word"); *Willenbring v. Neurauter*, 48 M.J. 152, 157-58 (C.A.A.F. 1998). Indeed, this is why the 2000 MEJA actually cuts against the Prosecution's argument, for that legislation was enacted by Congress specifically to fill the gap created by *Avarette*, a case mentioned by name, by providing courts-martial for military contractors in circumstances where Congress has not declared war.[8] The Congress, unlike the Prosecution here, recognized the legal difference between armed hostilities and declared wars.

Moreover, the charges in *Quirin* specifically permitted trial by commission via a federal statute. Some of the charges were ones that Congress had explicitly said were triable by a commission. And the specifications of the first charge mirrored offenses clearly designated by Congress as triable by commission. The prosecution is asking to extend *Quirin* far beyond its original moorings, to offenses that are in no way tethered to congressionally defined ones.

The prosecution claims *Quirin* says that Article 15 authorizes the use of a commission to try any offense against the law of war. But *Quirin* says the contary, by assuming that "there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not

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[7] In its response to D22, the Defense Motion Challenging Personal Jurisdiction, the Prosecution brazenly contends that the AUMF's wording is retrospective. As we explain in our Reply to the Prosecution in that Motion, that reading ignores the last half of the AUMF which conditions the power granted to the President to only prospective threats. Indeed, that is why many members of Congress believed the AUMF to be too *weak*. See Defense Response to Prosecution's Reply in D22.

[8] *See* 18 U.S.C. § 3261 *et seq*. (2000); Statement of Robert Reed, U.S.Dept' of Defense, H. Hrng. Military Extraterritorial Juris. Act. of 1999, at 13 (stating that *Reid v. Covert* limitations on dependents and *Avarette*'s limitation to "congressionally-declared wars" created a "jurisdictional gap in criminal justice and accountability that H.R. 3380 now addresses")

recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury." 317 U.S. at 29.

Another major distinction is that, unlike the *Quirin* saboteurs, Mr. Hamdan has not conceded his unlawful combatant status and contests the commission's jurisdiction. In *Quirin*, it was stipulated that the petitioners had received sabotage training, were members of the German armed forces, had come ashore in the United States with quantities of explosives, timers, and fuses, and had shed their German uniforms for civilian clothes. 317 U.S. at 20-21. The Court found that petitioners "upon the conceded facts" were within the boundaries of a commission. *Id.* at 46. It relied on that stipulation to find that the first charge was "sufficient to charge all the petitioners with the offense of unlawful belligerency . . . and the admitted facts affirmatively show that the charge is not merely colorable or without foundation." *Id.* at 36. *See also Ex parte Endo*, 323 U.S. 283, 302 (1944) (stating that authorization for detention was not present "in case of those whose loyalty was not conceded or established").[9] Thus here, where there are no admitted facts, the government cannot rely on *Quirin*.

On the facts, Mr. Hamdan is far closer to Mr. Milligan than he is to Mr. Quirin. The Prosecution would like to dismiss Milligan as a "civilian," but in fact the Government told the Court that he was an unlawful belligerent who "plotted to seize" arsenals and "conspired with and armed others."[10] The Prosecution's attempt to downplay *Milligan* is undermined by the Court's post-*Quirin* reliance on it in *Duncan,* 327 U.S. at 322 (emphasis added):

> Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued. Our system of government clearly is the antithesis of total military rule and the founders of this country are not likely to have contemplated complete military dominance within the limits of a *Territory* made part of this country and *not recently taken from an enemy.* They were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws. Their philosophy has been the people's throughout our history…We have always been especially concerned about the potential evils of summary criminal trials and have guarded against them by provisions embodied in the Constitution itself. See *Ex parte Milligan*. Legislatures and courts are not merely cherished American institutions; they are indispensable to our government.
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> Military tribunals have no such standing. For as this Court has said before: " . . . the military should always be kept in subjection to the laws of the

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[9] *See* Resp. United States Answer to Pet., 39 Landmark Briefs (Kurland & Casper eds.) 381-382 (providing several paragraphs stating that the eight individuals were trained at a sabotage school, landed in Florida and Long Island with explosives in uniform, buried their uniforms, and then noting that the eight "all admitted the facts stated in the preceding paragraphs of this answer," and "admitted that they had been paid by the German Government."); *Hamdi*, 124 S. Ct. at 2670 (Scalia, J., dissenting) (discussing *Quirin* limitations).

[10] 71 U.S. at 17. Lambdin Milligan was charged with: 1. 'Conspiracy against the Government of the United States;' 2. 'Affording aid and comfort to rebels against the authority of the United States;' 3. 'Inciting insurrection;' 4. 'Disloyal practices;' and 5. 'Violation of the laws of war.' Id, at 6. *See also id*. at 130 (majority op.); *id*. at 132 (op. of Chief Justice); *Hamdi*, 124 S. Ct., at 2667 (Scalia, J., dissenting).

> country to which it belongs, and that he is no friend to the Republic who advocates the contrary. . . Indeed, prior to the Organic Act, the only time this Court had ever discussed the supplanting of courts by military tribunals in a situation other than that involving the establishment of a military government over recently occupied enemy territory, it had emphatically declared that "civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.' *Ex parte Milligan.*

*See Reid*, 354 U.S. at 30 (*Milligan* is "one of the great landmarks in this Court's history").

Finally, the prosecution brazenly asserts that a recent federal trial court decision, *Mudd v. Caldera*, 134 F. Supp. 2d 138 (D.D.C. 2001) affirmed the constitutionality of military commissions. The stretch here is evident. *Mudd* dealt with the question of whether the Secretary of the Army, 140 years ago, acted arbitrarily. It did not affirm a military commission, and certainly not in an area that is not a zone of war. And, notably, *Mudd* boomerangs on the prosecutor, for that decision explains why abatement is necessary and why federal courts must decide these matters:

> there is no law that supports the Army's position that an Article III judge must defer to an agency or department of the Executive Branch or the head of such an agency or department--even to the Secretary of a branch of the military--on interpretations of decisions of the United States Supreme Court; for that is quintessentially a judicial function. …This is especially true where, as here, the Supreme Court precedent is based on constitutional concerns, which is an area of presumed judicial competence. …As Chief Justice Marshall said long ago: "It is emphatically the power and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). See Cooper v. Aaron, 358 U.S. 1, 18, 78 S.Ct. 1401, 3 L.Ed.2d 5, 3 L.Ed.2d 19 (1958) ("the federal judiciary is supreme in the exposition of the law of the Constitution")… "The federal Judiciary does not ... owe deference to the Executive Branch's interpretation of the Constitution. To paraphrase, orderly government requires that the Army be as scrupulous not to attempt to interfere with judicial matters as the judiciary must be scrupulous not to intervene in legitimate Army matters; and it is the responsibility of the judiciary to guard against such interference.

*Mudd*, 134 F. Supp. 2d, at 145.

E. *Madsen* does not sanction commissions under these circumstances

*Madsen v. Kinsella*, 343 U.S. 341 (1952) is a completely different case, one where the Supreme Court upheld the use of a military occupation court to try the wife of a serviceman for murder in post-WWII occupied Germany. Here, neither of these *Madsen* prerequisites are met – we are neither in a war declared by Congress nor has the commission been convened in occupied

territory. 343 U.S. at 348.[11] A trial at Guantanamo does not implicate any of the fundamental safety and order concerns explicit in *Madsen*'s holding. No court has ever, to the knowledge of undersigned counsel, upheld commissions in places that are not occupied territory or zones of war. Guantanamo is neither, and thus the commission is not properly constituted and must be struck down. *See* Paust, 79 NOTRE DAME L. REV. at 1363.

Indeed, *Milligan* requires the exercise of military jurisdiction to be "confined to the locality of actual war." *Id. at* 127. See also *Reid v. Covert*, 354 U.S. 1, 35, n.63 (1957) (discussing how military tribunals have been upheld in "enemy territory which had been conquered and held by force of arms and which was being governed at the time by our military forces."). Even in *Quirin*, the United States was separated into geographical military defense commands to prevent foreign invasion, and the Attorney General stressed the fact that this area "was declared to be under the control of the Army" based on the ongoing threat. Saboteur Tr. at 79. The Supreme Court noted this fact. 317 U.S. at 22 n. 1. And it cited Winthrop's treatise repeatedly, which makes this geographic limit clear: "The place must be the theatre of war or a place where military government or martial law may legally be exercised; otherwise a military commission (unless - authorized by statute) will have no jurisdiction of offense committed there." Winthrop, *supra*, at 836.

This point explains why the Commission lacks authority for a related reason: it is being run by civilian authorities, and is therefore improperly constituted. Throughout American history, to the best of undersigned counsel's knowledge, only military personnel have appointed members of commissions. For example, in 1942, President Roosevelt personally appointed the military commission to try the eight Nazi Saboteurs. *See Ex Parte Quirin*, 317 U.S. 1 (1942). Similarly, the military commission which resulted in *Johnson v. Eisentrager*, 339 U.S. 763, 70 S. Ct. 936 (1950) was appointed by the United States Commanding General at Nanking, China. Winthrop's treatise thus summarizes: "In absence of any statute prescribing by whom military commissions shall be constituted, they have been constituted in practice by the same commanders as are empowered by Arts. 72 and 73 to order general courts-martial, to wit, commanders of departments, armies, divisions, and separate brigades. The President, as Commander-in-chief, may of course assemble military commissions as he may legally assemble courts-martial." Winthrop, supra, at 835.

The Supreme Court expressly relied on Winthrop in explaining who has authority to appoint military commissions. See *In Re Yamashita*, 327 U.S. 1, 7 (1946). But in this Commission the Secretary of Defense chose to delegate the authority to appoint members of commissions to a federal civilian employee who is neither a commanding officer nor a commissioned officer. The Secretary had no authority to do so and the commission is void.

Returning to *Madsen*, if there were any doubts about *Madsen*'s holding, the Supreme Court's subsequent decision in *Reid v. Covert* resolved them. In spite of the existence of Article 15 and treaties that provided for all crimes committed by servicemen or their dependants to be tried by military courts, the Court held that the two petitioners, not in recently conquered territory, could not be subject to military trial because the Court would not indulge "[t]he concept

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[11] The Court further made clear that this latter constraint arose from the fact that the President has the "urgent responsibility" to "govern[] any territory occupied by the United States by force of arms." *Id*.; *see also id*. at 355 ("The jurisdiction exercised by our military commissions . . . extended to nonmilitary crimes . . . which the United States as the *occupying power* felt it necessary to suppress.") (emphasis added).

that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise" because to do so would "destroy the benefit of a written Constitution and undermine the basis of our Government." 354 U.S. at 14 (plurality op.); *see also Quarles*, 350 U.S. at 22 (noting that "[f]ree countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.").[12]

When confronted with *Madsen*, *Reid* easily disposed of it. "*Madsen* [] is not controlling here. It concerned trials in enemy territory which had been conquered and held by force of arms and which was being governed at the time by our military forces." 345 U.S. at 35 n.63. And while "the extraordinary circumstances *present in an area of actual fighting* ha[d] been considered sufficient to permit punishment of some civilians *in that area* by military courts under military rules," *id*. at 33, the Court rejected the government's contention there that "present threats to peace" justify the military trial of civilians in an area where there no hostilities because the "exigencies which have required military rule on the battlefront are not present in areas where no conflict exists," *id*. at 35.[13] "Throughout history many transgressions by the military have been called 'slight' and have been justified as 'reasonable' in light of the 'uniqueness' of the times," but "[w]e should not break faith with this nation's tradition of keeping military power subservient to civil authority, a tradition . . . firmly embodied in the Constitution." *Id*. at 40; *see also Duncan, supra*; *Toth, supra*.

Finally, the Prosecution spends much time trying to make an argument that *Loving v. United States*, 517 U.S. 748 (1996) somehow bears on this question. The attempt entirely fails. *Loving* concerned a case about a congressionally enacted scheme and apparatus of justice, the court-martial. The specific question the Supreme Court dealt with was whether the President could issue aggravating factors in capital cases. Naturally, the answer it gave to that easy question was "yes." But *Loving* reaffirms the very principle at stake here: that it is up to *Congress* to set up that apparatus of justice before the President can make the micro-decisions about how to best go about implementing it. "Even before the birth of this country, separation of powers was known to be a defense against tyranny. Montesquieu, The Spirit of the Laws 151-152 (T. Nugent trans. 1949)." *Loving, supra*. Indeed, *Loving* explains precisely why the Founders of our nation would have been aghast at the principle being asserted by the prosecution here:

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[12] While the *Reid* opinion was supported by only a plurality of the Court, three years later a clear majority affirmed the plurality's holding and expanded it to preclude military jurisdiction over civilian dependants accused of even noncapital crimes, at least when "the critical areas of occupation" were not involved. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 244-46 (1960). Significantly, *Singleton* held that allowing the military to exercise jurisdiction over civilian noncapital offenders would "would place in the hands of the military an unreviewable discretion to exercise jurisdiction over civilian dependents simply by downgrading the offense, thus stripping the accused of his constitutional rights and protections." *Id*. at 244. Similarly here, the government's position would allow the military unreviewable discretion to exercise jurisdiction over virtually anyone by simply designating them an enemy combatant. This Court should, as the *Singleton* Court did, recognize this as an untenable claim.

[13] In *Reid*, the government also urged that the concept of "battlefield" should be extended to include dependants traveling with military personnel because of the "conditions of world tension which exist at the present time." *Id*. at 34. The Court rejected this argument, holding that "[m]ilitary trial of civilians 'in the field' is an extraordinary jurisdiction and it should not be expanded at the expense of the Bill of Rights." *Id*. at 35. *See also Toth*, 350 U.S. at 23.

> the Framers well knew this history, and had encountered firsthand the abuses of military law in the colonies….What they distrusted were not courts martial *per se*, but military justice dispensed by a commander unchecked by the civil power in proceedings so summary as to be lawless…The partial security Englishmen won against such abuse in 1689 was to give Parliament, preeminent guardian of the British constitution, primacy in matters of military law. …Far from attempting to replicate the English system, of course, the Framers separated the powers of the Federal Government into three branches to avoid dangers they thought latent or inevitable in the parliamentary structure. The historical necessities and events of the English constitutional experience, though, were familiar to them and inform our understanding of the purpose and meaning of constitutional provisions. As we have observed before, with this experience to consult they elected not to "freeze court martial usage at a particular time" for all ages following, *Solorio*, 483 U. S., at 446, nor did they deprive Congress of the services of the Executive in establishing rules for the governance of the military, including rules for capital punishment. In the words of Alexander Hamilton, the power to regulate the armed forces, like other powers related to the common defense, was given to Congress 'without limitation.'"

*Loving*, *supra*. The Prosecution's invocation of *Loving* does not help their cause.

The bottom line is this: military commissions are absolutely permissible when there is no other source of law in a conquered territory or a genuine emergency necessitating a legal regime. That is why the Prosecution's own footnote 4 of their motion quotes Davis to say that commissions arise only when offenders would "go unpunished." That is not the case any longer. Congress has specifically said that courts martial can try violations of the laws of war. The risk of someone going unpunished is nonexistent. And if the Congress believes Commissions are somehow necessary, it is always free to pass a law to establish them.

F. The President's Inherent Authority Does Not Authorize Commissions

The animating assumption of the Prosecution's argument throughout is the never-accepted notion of inherent authority. *See Quirin*, 317 U.S. at 28-28 (declining to answer this question).[14] Clearly the power and authority to create and convene commissions is a recognized

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[14] Indeed, the Prosecution's notion of inherent executive power was rejected as early as 1818 in an opinion by Attorney General William Wirt. To Wirt, it is a "clear principle," that the President "has no powers except those derived from the constitution and laws of the United States; if the power in question, therefore, cannot be fairly deduced from these sources, it does not exist at all." 1 Op. Att'y Gen. 233 (1818). The Constitution's vesting of the Commander in Chief was limited, for

> in a government limited like ours, it would not be safe to draw from this provision inferential powers, by a forced analogy to other governments differently constituted. Let us draw from it, therefore, no other inference than that, under the constitution, the President is the national and proper depositary of the final appellate power, in all judicial matters touching the police of the

function of a government at war. To say that such power exists as an exercise of the war power, however, is quite different from saying that such power inheres in the Executive. Even a cursory reading of the text shows that the Framers divided the "war power," allocating to the Legislative Branch the power to declare war, maintain and Army and Navy, and allocate funds for the military while reserving the President the power to act as Commander-in-Chief. U.S. Const. art. I, § 8; art. II § 2.[15]

Article I specifically grants Congress the power to "constitute Tribunals inferior to the supreme Court" as well as to "define and punish . . . Offences against the Law of Nations." U.S. Const. art. I, § 8. Given that Article I speaks with such specificity whereas Article II's closest analog is the general grant of Commander-in-Chief power, the Constitution is best read as allocating the power to authorize commissions to the Congress. *In re Yamashita*, 327 U.S. at 7 ("We [in *Quirin*] pointed out that Congress in the exercise of the power conferred upon it by Article I, § 8, Cl. 10 of the Constitution to 'define and punish . . . Offences against the Law of Nations . . .,' of which the law of war is a part, had by the Articles of War recognized the 'military commission' . . . .")(citation omitted); *id.* at 8,9,10. Nothing suggests that the President may unilaterally authorize such commissions.[16]

G. The Early American Precedents Cited by the Prosecution Do Not Help Them

The government's appeal to historical precedent is without merit. General Washington's use of a "court martial" during the Revolutionary War predates the modern Constitution and its separation of powers. And the Continental Congress had enacted rules of warfare at the time that authorized the punishment of spies with death. Winthrop, supra, at 21; 2 Journals of the Continental Congress 90 at 693 (1905)). Further, the fact that Presidents have appointed commissions in the past does not speak to whether or not they have the inherent authority to do so–for they may have been authorized by Congress. Even the Prosecution's own source for their

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> army; but let us not claim this power for him, unless it has been communicated to him by some specific grant from Congress, the fountain of all law under the constitution.

In his opinion, Wirt explained that an 1802 statute gave the President the power to have an appellate role in military cases. Id.

[15] The President "and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." *Reid*, 354 U.S. at 39; *see also Toth*, 350 U.S. at 17; *The Brig Army Warwick*, 67 U.S. 635, 668 (1863); *Dakota Cent. Tel. Co. v. South Dakota*, 250 U.S. 163, 183 (1919); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948). The "principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976).

[16] *Hirota v. MacArthur*, 338 U.S. 197 (1948), is unavailing. The per curiam opinion decided that U.S. courts had no authority to review petitions from prisoners who were sentenced by an international tribunal. *Id*. at 198. Justice Douglas's concurrence explicitly noted that "[w]e need not consider to what extent, if any, the President . . . would have to follow . . . the procedure that Congress had prescribed" because the tribunal at issue was not a traditional military court but an international tribunal established by the Allied powers. *Id*. at 208.

historical examples finds that military commissions have derived from Congress's constitutional powers. Winthrop, *supra*, at 831.

1. *1818*. In a startling claim, the Prosecution relies on General Andrew Jackson's decision to try two British individuals, Alexander Arbuthnot and Robert Christy Ambrister, before a commission. Ambister was sentenced by the commission "to suffer death by being shot, two-thirds of the court concurring therein." But one of the members of the commission asked for reconsideration and a revote. Upon that revote, Ambister was sentenced to "fifty stripes on his bare back" and confinement and hard labor for twelve months.[17] Jackson overrode the court and directed that Ambrister be shot, an order that was carried out.

The reaction from the United States Congress was swift and powerful. The House Committee on Military Affairs stated that it could find "no law of the United States authorizing a trial before a military court for offences such as are alleged" against the two men, except that of "acting as a spy," for which Arbuthnot was found not guilty.[18] It acknowledged that the law of nations recognized that "where the war is with a savage nation, which observes no rules, and never gives quarter, we may punish them in the persons of any of their people whom we may take, (these belonging to the number of the guilty,) and endeavor, by this rigorous proceeding, to force them to respect the laws of humanity; but wherever severity is not absolutely necessary, clemency becomes a duty." After their intensive review, however, the committee was unable to find "a shadow of necessity for the death of the persons arraigned before the court." *Id.*

Indeed, the House expressly repudiated the claim for the commission's jurisdiction, a claim that is the very same one being made today. General Jackson had argued that "It is an established principle of the law of nations, that any individual of a nation, making war against the citizens of another nation, they being at peace, forfeits his allegiance, and becomes an outlaw and a pirate." But the House found that piracy was not something triable by commission, and that Arbuthnot and Ambrister could not be considered "outlaws" for that term "applies only to the relations of individuals with their own Government." *Id.*

The House Committee pointed out that Ambrister was executed "after having been subjected to a trial before a court which had no cognizance or jurisdiction over the offences charged against him, was shot by order of the commanding general [Jackson], contrary of the forms and usages of the army, and without regard to the finding of that court, which had been instituted as a guide for himself." It further stated that "A court-martial is a tribunal erected with limited jurisdiction, having for its guidance the same rules of evidence which govern courts of law; and yet Arbuthnot is refused by the court-martial, before whom he was on trial for his life, the benefit of Ambrister, who had not been put upon his trial at that time, and whose evidence would have been received by any court of law, as legal, if not credible." Hearsay evidence in such a case, the committee further said, "was never before received against the

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[17] 1 American State Papers: Military Affairs 730-35 (1832). Much of the material that appears in this section appears in a forthcoming book by Louis Fisher, a senior librarian at the Library of Congress, called Military Tribunals and Presidential Power (University of Kansas Press).

[18] Annals of Cong., 15th Cong., 2d Sess. 515-27 (1819)

accused in any court of this country." *Id.* Having completed this evaluation, the committee disapproved the proceedings in the trial and execution of Arbuthnot and Ambrister.

The Senate was no different. A Senate Committee report said that it "cannot but consider" the executions of Arbuthnot and Ambrister "as an unnecessary act of severity, on the part of the commanding general, and a departure from that mild and humane system towards prisoners, which, in all our conflicts with savage or civilized nations, has heretofore been considered, not only honorable to the national character, but conformable to the dictates of sound policy."[19] The committee further stated: "Humanity shudders at the idea of a cold-blooded execution of prisoners, disarmed, and in the power of the conquerer." It rejected the theory that Arbuthnot and Ambrister were "outlaws and pirates," and found that Jackson, having created a military court to try them, set aside the sentence of whipping and confinement "and substituted for that sentence his own arbitrary will." Id. And this is why Winthrop's treatise would never, ever, rely on this precedent as something that should be followed again. This is the Prosecution's own source, Winthrop's, description of what General Jackson did:

> [General Jackson's] order not only contained a false statement of fact, but- not being an act of war or resorted to in the exercise of martial law, but official action taken upon the proceedings of a court-martial under the Articles of war- was wholly arbitrary and illegal. For such an order and its execution a military commander would *now* be indictable for murder."[20]

2. *The Mexican American War*. On February 19, 1847, during a *congressionally declared war*, General Scott issued General Orders No. 20, proclaiming a state of martial law at Tampico. General Scott promulgated an Order out of bare necessity, for he could find "no legal punishment for any of those offences, for by the strange omission of Congress, American troops take with them beyond the limits of their own country, no law but the Constitution of the United States, and the rules and articles of war." Those legal standards "do not provide any court for the trial or punishment of murder, rape, theft, &c., &c.—no matter by whom, or on whom committed." To "suppress these disgraceful acts abroad," he issued the martial law order "until Congress could be stimulated to legislate on the subject." 2 Memoirs of Lieut.-General Scott 392-93 (1864). Indeed, the Secretary of War was told by a Senate chairman that there was no need for legislation. The right to punish for such offences "necessarily resulted from the condition of things when an army is prosecuting hostilities in an enemy's country." H. Exec.

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[19] S. Doc. No. 100, 15th Cong., 2d Sess. 11-12 (1819). This committee report is reprinted at Annals of Cong., 15th Cong., 2d Sess. 256-68 (1819).

[20] Winthrop, supra, at 464-65. Incidentally, this was not the first time Jackson had trouble respecting the Constitution when it came to military tribunals. Jackson was rebuked for using a tribunal in New Orleans following the War of 1812. When an newspaper article in New Orleans was written in 1815 that claimed that those accused of crimes should come before civil courts and not military ones, Jackson had the writer of the Article arrested. The writer's lawyer secured a writ of habeas corpus from a federal judge, Judge Dominick Hall. General Jackson then went and had Judge Hall arrested and confined with the writer of the newspaper article for "aiding and exciting mutiny." 3 The Papers of Andrew Jackson 205 (Harold D. Moser ed., 1991); Robert V. Remini, The Battle of New Orleans: Andrew Jackson and America's First Military Victory 57-59 (2001 paper ed.); Robert V. Remini, Andrew Jackson and the Course of American Empire, 1767-1821, at 310 (1977). Hardly an appealing precedent.

Doc. No. 56, 30th Cong., 1st Sess. 63-64 (1848). Again, that is the *Madsen* field commission power, and irrelevant to the case at hand.

In any event, the 1847 precedent explains precisely what is lacking in Mr. Hamdan's military commission. General Scott's Order specifically applied the rules and procedures of courts-martial and the Articles of War. All offenders "shall be promptly seized, confined, and reported for trial, before military commissions, . . . appointed, governed, and limited, as nearly as practicable, as prescribed by the 65th, 66th, 67th, and 97th, of the said rules and articles of war." And he made clear that individuals could not be convicted for offenses that were not already offenses in the American states. No sentence of a tribunal "shall be put in execution against any individual belonging to this army, which may not be, according to the nature and degree of the offence, as established by evidence, in conformity with known punishments, in like cases, in some one of the States of the United States of America." 2 Memoirs of Lieut.-General Scott 540-44.

On September 17, 1847, General Scott modified General Order No. 20. He listed a number of offenses, including assassination, murder, poisoning, rape, and theft, that could be punished by civil courts but not by military courts. The written military code "does not provide for the punishment of any *one* of those crimes, even when committed by individuals of the Army upon the persons or property of other individuals of the same." Every military tribunal created to deal with these crimes "will be appointed, governed, and limited, as nearly as practicable," by specified Articles of War, meaning that the rules for courts martial governed these commissions. The proceedings of the tribunals would "be duly recorded in writing, reviewed, revised, disapproved or approved, and the sentences executed—all, as near as may be, as in the cases of the proceedings and sentences of courts-martial; provided, that no military commission shall try any case clearly cognizable by any court-martial." Birkhimer, Military Government and Martial Law, at 581-82. The Order specifically made clear that "no military commission shall try any case clearly cognizable by any court-martial." *See* General Orders, No. 287, at ¶ 11 (Sept. 17, 1847). Of the 117 individuals tried in Mexico, 74 were Americans. David Glazier, "Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission," 89 Va. L. Rev. 2005, 2031-32 (2003).

The prosecution also does not mention how the United States Supreme Court reacted to the broad assertion of presidential authority in the Mexican-American war. The Court stated that while the President "may invade the hostile country, and subject it to the sovereignty and authority of the United States," "his conquests do not enlarge the boundaries of the Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power." Fleming v. Page, 9 How. (50 U.S.) 603, 615 (1850). Accordingly, the President was unable to create a customhouse at Tampico, for "this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military." Id. Indeed, in broad language the Supreme Court said that the President acting on his own did not have the power to create courts to administer the law of nations. An American court "must derive its jurisdiction and judicial authority from the Constitution or the laws of the United States. And neither the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals in prize cases, *nor to administer the laws of nations.*" Jecker v. Montgomery, 13 How. (54 U.S.) 498, 515 (1852) (emphasis added).

3. *The Civil War*. The prosecution claims that statutory recognition of commissions only began in 1863. Defense Counsel has not had ample time to review this claim in detail, but knows it to be false on its own terms, since at the very least military commissions were recognized by 12 Stat. 598, sec. 5 (1862). The precedents they cite during and after the Civil War are absolutely irrelevant, since they were done against the backdrop of laws of the United States Congress authorizing commissions. See Act of July 2, 1864; Act of Jul 4, 1864, Act of March 2, 1869 (stating that military commanders when necessary "shall have power to organize military commissions or tribunals").

And despite the existence of those laws, the Supreme Court in the *Milligan* case still found that the commission was impermissible. Mr. Hamdan's case is even farther from a traditional military commission than was Mr. Milligan's. Even during a stunted view of constitutional rights at the time of the Civil War – before the modern twentieth century expansion of individual rights – Mr. Milligan's commission was still found unconstitutional.

H. The Prosecution is Seeking to Create a Commission That Has Never Before Existed in American History

This is the first commission ever to take place in an area many hundreds of miles from a theater of war. The facts that war has not been declared, the process is being run by civilians, and that the offenses are not tied to ones authorized for commission trial by Congress (all the while during a time when court-martial and civilian jurisdiction are both available) taken together make the matter far worse. And the ultimate straw is that the Prosecution steadfastly maintains that it is following the rules laid down from earlier wars,[21] where none of these limiting facts existed, and which predate the earth shattering revolution in military law in 1950 (the UCMJ) and international law (the Geneva Conventions).

Indeed, undersigned counsel has now completed an exhaustive study of the bills passed by the Congress of the United States. It has *never* appropriated money to fund this military commission. Contrast that refusal to fund the commissions with the Civil War, where appropriations for forty years had specifically demarcated funding for the commissions. As Winthrop puts it at p.834 of his treatise:

> Further statutory recognitions of the commission as a tribunal known to our law are contained in the series of Army Appropriation Acts, from that of June 15, 1864, to the most recent of March 3, 1885, in all of which, (with exceptions between 1872 and 1876,) are items of appropriation for the 'expenses of courts-martial, *military commissions*, and courts of inquiry,"

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[21] The procedures are not even those of courts martial, which is the standard way military commissions were to take place. Indeed, even the Prosecution's *own sources* of authority admit this. See George B. Davis, A Treaty on the Military Law of the United States 309 (1913)("Except in so far as to invest military commissions in a few cases with a special jurisdiction and power of punishment, the statute law has failed to define their authority, nor has it made provision in regard to their constitution, composition, or procedure. In consequence, the rules which apply in these particulars to general courts-martial have almost uniformly been applied to military commissions.") (footnote omitted).

While a congressional appropriation is by no means sufficient to show congressional approval, it its absence is strikingly revealing. See Ex Parte Endo, 323 U.S. at 303 n.24.

The Prosecutor has brazenly stretched the United States Constitution, the laws of the United States, and the decisions of the Supreme Court to try to justify this new entity at Guantanamo, which is unlike any commission ever seen before. While such a commission may be possible in some other country, it is most assuredly not in a regime under law, dedicated to dividing power instead of concentrating it in the Executive. When the Prosecutor cannot point to a law, or even a simple dollar figure, by Congress that authorizes the commission, there is something deeply, deeply wrong.

5. Files Attached. None.

6. Oral Argument. The Defense does request oral argument on this motion and our reply to the Government's response. Our basis remains the same as in our original motion (D20).

7. Legal Authority Cited.

a. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004)

b. Art II, United States Constitution

c. Ex Parte Quirin, 317 U.S. 1 (1942)

d. Brief of Military Attorneys in *Rasul*, available at www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/91/AmicusCuriae_Military_Attorneys.pdf

e. Geneva Convention for the Detention and Treatment of Prisoners of War

f. Ex Parte Milligan, 71 U.S. 2 (1866)

g. 10 U.S.C. § 818

h. 10 U.S.C. § 821

i. Gregory v. Ashcroft, 501 U.S. 452 (1991)

j. In Re Yamashita, 327 U.S. 1 (1946)

k. Madsen v. Kinsella, 343 U.S. 341 (1952)

l. Winthrop: Military Law and Precedents (1896)

m. 50 U.S.C. § 38

n. Espionage Act of 1917, 40 Stat. 219

o. Act of June 25, 1948, 62 Stat. 683

p. Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. § 3261 (2000)

q. AUMF, 18 USCS § 4001

r. U.S. v. Averette, 19 U.S.C.M.A. 363 (1970)

s. Cole v. Laird, 468 F.2d 829 (5th Cir. 1972)

t. Robb v. U.S. 456 F.2d 768 (Ct. Cl. 1972)

u. Willenbring v. Neurauter, 48 M.J. 152 (CAAF 1998)

v. Ex Parte Endo, 323 U.S. 283 (1944)

w. In re Duncan, 139 U.S. 449 (1891)

x. Reid v. Covert, 354 U.S. 1 (1957)

y. Mudd v. Caldera, 134 F. Supp. 2d 138 (D.D.C. 2001)

z. Paust, 79 NOTRE DAME L. REV. at 1363

aa. Johnson v. Eisentrager, 339 U.S. 763 (1950)

bb. Toth v. Quarles, 350 U.S. 11 (1955)

cc. Kinsella v. U.S. ex rel. Singleton, 361 U.S. 234 (1960)

dd. Loving v. U.S., 517 U.S. 748 (1996)

ee Montesquieu, The Spirit of the Laws (T. Nugent Trans. 1949)

ff. Art I, U.S. Constitution

gg. The Brig Army Warwick, 67 U.S. 635 (1863)

hh. Dakota Cent. Tel. Co. v. South Dakota, 250 U.S. 163 (1919)

ii. Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948)

jj. Buckley v. Valeo, 424 U.S. 1, 124 (1976)

kk. Hirota v. MacArthur, 338 U.S. 197 (1948)

ll. 2 Journals of the Continental Congress, 90 at 693 (1905)

mm. 1 American State Papers: Military Affairs 730-35 (1832)

nn. Annals of Cong., 15th Cong., 2d Sess. 515-27 (1819)

oo. S. Doc. No. 100, 15th Cong., 2d Sess. 11-12 (1819). This committee report is reprinted at Annals of Cong., 15th Cong., 2d Sess. 256-68 (1819)

pp. 2 Memoirs of Lieut.-General Scott 392-93 (1864)

qq. H. Exec. Doc. No. 56, 30th Cong., 1st Sess. 63-64 (1848)

rr. Birkhimer, Military Government and Martial Law, at 581-82

ss. David Glazier, "Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission," 89 Va. L. Rev. 2005, 2031-32 (2003)

tt. Fleming v. Page, 9 How. (50 U.S.) 603 (1850)

uu. Jecker v. Montgomery, 13 How. (54 U.S.) 498 (1852)

vv. 12 Stat. 598, sec. 5 (1862)

ww. Act of July 2, 1864

xx. Act of July 4, 1864

yy. Act of March 2, 1869

zz. George B. Davis, A Treaty on the Military Law of the United States 309 (1913)

8. Witnesses/Evidence Required. Our position remains the same as in our original motion, D20.

9. Additional Information. None.

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